

STATE OF MICHIGAN
COURT OF APPEALS

DENNIS MONETTE and SANDRA K.
MONETTE,

Plaintiffs-Appellees,

v

DARLENE HILL SERVISS,

Defendant-Appellant.

UNPUBLISHED
September 11, 2008

No. 277609
Huron Circuit Court
LC No. 06-003080-CH

Before: Donofrio, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's judgment ordering reformation of a land contract. Because, plaintiffs' failure to obtain a staked survey does not require reversal of the trial court's decision to reform the contract; the record contains sufficient evidence to support the trial court's conclusion that there was clear and convincing evidence of mutual mistake; the trial court did not err in not ruling on the misrepresentation claim; and, defendant has not demonstrated how she was prejudiced by the trial court's decision to sequester her son as a witness, we affirm.

Plaintiffs and defendant entered into a purchase agreement and a land contract for the sale of a portion of defendant's property along the Pigeon River. The property included land and a building used as a bar. The trial court found that at the time the parties executed the purchase agreement and land contract they believed the sale included a parking lot that was south of the bar building. The trial court further found that unbeknownst to the parties and their transactional attorneys, the legal description of the property in the land contract did not include the parking lot. The evidence at trial demonstrated that after the parties executed the contracts, animosity grew between plaintiffs and defendant's son regarding the adjacent marina property owned by defendant. Defendant's son attempted to block off the parking lot, claiming that plaintiffs did not own that portion of the property. Plaintiffs brought this action to enjoin defendant's son from blocking off the parking lot and to reform the contract to reflect the parties' intent to transfer the parking lot from defendant to plaintiffs.

On appeal, defendant first argues that plaintiffs are not entitled to reformation of the contract because they failed to obtain a staked survey of the property that would have shown the parking lot was not part of the bar parcel. Defendant challenges the trial court's factual findings

regarding the mutual mistake on the boundaries of the property, and challenges the trial court's analysis of the assumption of risk doctrine. We review the factual issues for clear error, MCR 2.613(C), and we review the court's legal conclusions de novo, *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 130; 743 NW2d 585 (2007).

A court sitting in equity may reform a contract based on clear and convincing evidence of mutual mistake. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 398-399; 729 NW2d 277 (2006). We conclude that the record here supports the trial court's findings regarding the mutual mistake. It appears from the record that defendant knew and intended the parking lot would be included in the sale, but that defendant's son, who was not a party to the contract, did not want the parking lot to be included in the sale. Defendant's son handled the negotiations for the sale, and denied ever indicating to plaintiffs that the parking lot would be included. The trial court found defendant's son's testimony not credible, and found other witnesses—including defendant—more credible with regard to the intent to include the parking lot in the sale. This Court must defer to the trial court's assessment of the witnesses' credibility. *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652; 662 NW2d 424 (2003).

A court may not reform a land contract based on a mistake in drafting unless the mistake is proven by clear and convincing evidence and the mistake is mutual to the parties to the contract. *Troff v Boeve*, 354 Mich 593, 596-597; 93 NW2d 311 (1958). Here, the trial court found that defendant, who was the actual seller of the property, intended to sell the parking lot with the bar property, and that the contractual description of the property did not correspond to the parties' intent. That defendant's son, who was not a party to the contract, subsequently decided he wanted to retain the parking lot did not alter defendant's intent to sell it. Because plaintiffs proved the mistake by clear and convincing evidence, and that the mistake was mutual to the contracting parties, the trial court did not err in reforming the contract to include the parking lot.

We also conclude that the trial court was within its authority acting in equity to determine that reformation was an appropriate remedy notwithstanding plaintiffs' failure to obtain a staked survey. A court may reform a land contract if the terms used in the contract result in a legal effect that differs from the agreement the parties actually made. See *Schmalzriedt v Titsworth*, 305 Mich 109, 119-120; 9 NW2d 24 (1943). That plaintiffs elected not to obtain a staked survey does not necessarily preclude reformation given that the record indicated defendant's son told plaintiffs that the parking lot was part of the bar parcel and also told them that he would provide a survey of the property.

Defendant next argues that the trial court erred by finding in favor of plaintiffs on their misrepresentation claim. However, the record does not indicate that the trial court made any findings relevant to the misrepresentation claim. Rather, the trial court based its judgment solely on its conclusion that the clear and convincing evidence demonstrated a mutual mistake of fact. Given the trial court's conclusion on the mutual mistake claim, it did not need to address the misrepresentation claim. Accordingly, defendant presents no valid claim of error regarding the misrepresentation claim.

Finally, defendant maintains that the trial court erred by binding defendant's son to the witness sequestration order. According to defendant, her son was entitled to attend the trial by virtue of his appointment as her attorney-in-fact. We review the trial court's ruling on

sequestration of witnesses for an abuse of discretion. *Kwaiser v Peters*, 6 Mich App 153, 159; 148 NW2d 547 (1967). Further, we will not reverse a judgment based on a sequestration order absent a showing of prejudice from the order. *Id.* Here, defendant has not demonstrated how she was prejudiced by the trial court's decision to sequester her son as a witness. Defendant has not shown error.

Affirmed.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald